93-485

No.

Supreme Court, U.S.
FILED
SEP 24 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

JANETTE COLLIER and ALLEN L. FEINGOLD,
Petitioners,

vs.

MARSHALL, DENNEHEY, WARNER COLEMAN & GOGGIN; ROBERT G. HANNA, JR., ESQ.; W.V. PANGBORNE COMPANY, INC.; CITY OF PHILADELPHIA; SANDRA MAZER MOSS and GILDA KRAMER,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

ALLEN L. FEINGOLD
Attorney for Petitioner, Pro Se
Suite 809
One East Penn Square
Philadelphia, Pennsylvania 19107
(215) 564-3500

4239
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTIONS PRESENTED

1. Whether the district courts have jurisdiction under Fed. R. Civ. P. 60(b) to entertain a petition to extend the time for filing a notice of appeal under Fed. R. App. P. 4(a)(5), filed more than sixty (60) days following the entry of the order sought to be appealed, where a timely appeal of the district court's order is taken in the name of the wrong party and such fact is not discovered by anyone until the issuance of an opinion dismissing the appeal by the Court of Appeals, and the purpose of extending the time for filing a notice of appeal is to cure the defect leading to dismissal of the timely filed appeal?

2. Whether the district court abuses its discretion in refusing to extend the time for filing a notice of appeal, where an initial appeal taken from the district court's order is dismissed by the Court of Appeals because the wrong party is designated as the appellant, the fact that the wrong party is designated is not discovered by anyone until the issuance of the decision of the Court of Appeals dismissing the appeal, a motion to extend the time for filing a notice of appeal of the district court's order is filed promptly upon discovery that the wrong party is designated as the appellant, and the failure to discover that the wrong party was designated as the appellant was the result of excusable neglect and unusual circumstances?

LISTING OF PARTIES

Janette Collier — *Plaintiff*

Allen L. Feingold, Esquire — *Counsel for Plaintiff; Petitioner* herein

City of Philadelphia — *Defendant*

The Honorable Sandra Mazer Moss — *Defendant*

Gilda Kramer — *Defendant*

W.V. Pangborne Company — *Defendant*

Robert G. Hanna, Esquire — *Defendant*

Marshall, Dennehey, Warner, Coleman & Goggin — *Defendant*

TABLE OF CONTENTS

	Page
Questions Presented	i
Listing of Parties	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	1
Constitutional Provisions and Statutes Involved	2
Statement of the Case	6
Reasons for Granting the Writ	9
I. The district court erred in holding that it lacked jurisdiction to consider petitioner's motion for leave to file a *nunc pro tunc* appeal because petitioner's motion was not filed within sixty days of the judgment sought to be reviewed in the appeal.	9
II. The district court abused its discretion in denying petitioner's motion for leave to file a *nunc pro tunc* appeal.	13
Conclusion	18

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Ali v. Lyles, 769 F.2d 204 (4th Cir. 1985) 12

Beard v. Carrollton Railroad, 893 F.2d 117 (6th Cir. 1989) 12

Consolidated Freightways Corp. of Delaware v. Larson, 827 F.2d 916 (3rd Cir. 1987) 14, 15, 16

Cuevas v. Reading & Bates Corporation, 770 F.2d 1371 (5th Cir. 1985) 12

Kaercher v. Trustees of Health & Hospital of Boston, 834 F.2d 31 (1st Cir. 1987) 12

Melton v. Frank, 891 F.2d 1054 (2nd Cir. 1989) 12

Rodgers v. Watt, 722 F.2d 456 (9th Cir. 1983) 12

Wallace v. McManus, 776 F.2d 915 (10th Cir. 1985) 11

Statutes Cited:

28 U.S.C. § 1254 1

42 U.S.C. § 1983 7

42 U.S.C. § 1984 7

Contents

Page

42 U.S.C. § 1988 8

Rules Cited:

Federal Rules of Appellate Procedure:

Rule 3(c) 9

Rule 4 12

Rule 4(a) 2

Rule 4(a)(5) .....i, 10, 11, 12, 13, 14, 17

Federal Rules of Civil Procedure:

Rule 11 .....8, 9, 13, 15

Rule 12(b)(6) 7, 17

Rule 60 4

Rule 60(b) .....i, 10, 11, 12, 13, 14, 17

Rule 60(b)(6) 13

Supreme Court Rule 13.1 1

Contents

Page

APPENDIX

Appendix A — Judgment Order of the United States Court of Appeals for the Third Judicial Circuit at No. 92-2075 Entered June 30, 1993 ..... 1a

Appendix B — Order of the United States District Court for the Eastern District of Pennsylvania Entered November 23, 1992 ..... 3a

Appendix C — Opinion of the United States Court of Appeals for the Third Judicial Circuit at No. 91-2081 Entered October 13, 1992 ..... 5a

Appendix D — Order and Opinion of the United States District Court for the Eastern District of Pennsylvania Entered December 3, 1991 ..... 11a

OPINIONS BELOW

The memorandum opinion and order of the district court at No. 90-6001, E. D. Pa., entered on December 3, 1991, imposing Fed. R. Civ. P. 11 sanctions upon petitioner, is unreported and is included in the appendix at Appendix D, 11a. The opinion of the Third Circuit Court of Appeals, at No. 91-2081, dismissing petitioner's appeal of the district court's order was issued on October 13, 1992 and is reported at 977 F.2d 93 (3rd Cir. 1992). A copy of this opinion is included in the appendix at Appendix C, 5a. The order of the district court denying petitioner's motion to extend the time for filing a notice of appeal of the district court's order of December 3, 1991, entered on November 23, 1992, is unreported and is included in the appendix at Appendix B, 3a. The judgment order of the Third Circuit Court of Appeals, at No. 92-2075, affirming the denial of petitioner's motion to extend the time for filing a notice of appeal of the district court's order of December 3, 1991, issued on June 30, 1993. The judgment order is not yet reported and included in the appendix at Appendix A, 1a.

STATEMENT OF JURISDICTION

The decision of the Third Circuit Court of Appeals from which petitioner seeks a Writ of Certiorari was filed on June 30,1993. This petition is being filed within ninety (90) days of that date pursuant to Supreme Court Rule 13.1. Jurisdiction is vested in this Court to review the judgment order of the Third Circuit Court of Appeals pursuant to 28 U.S.C. § 1254. Subject matter jurisdiction exists because the decision sought to be reviewed involves an interpretation of the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Federal Rule of Appellate Procedure 4(a):

(a) *Appeals in Civil Cases*

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

(2) Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

(3) If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before the expiration of the prescribed time period may be ex parte unless the court otherwise requires. Notice of any such motion filed which is filed after the expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(6) The district court, if it finds (a) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may, upon motion filed within 180 days of the entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

(7) A judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

Federal Rule of Civil Procedure 60:

(a) *Clerical Mistakes.* Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.*

On motion and upon such terms as are just, the

court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT OF THE CASE

In July of 1974, Janette Collier was sitting on the front steps of a building in Philadelphia. A car driven by a drunk-driver struck a light pole near Collier and caused the pole to collapse. The falling pole struck Collier, causing severe and permanent disfiguring injuries. Collier brought an action to recover for her injuries against the uninsured drunk-driver, the City of Philadelphia (which owned the pole) and W.V. Pangborne Company (which installed the pole) in the Philadelphia County Court of Common Pleas.

Collier and her counsel pursued the litigation through discovery, finding all of their efforts resisted by Pangborne and the City. Despite these obstacles, Collier prepared the case for trial and waited several years for the matter to be assigned. Ultimately, the Honorable Murray Goldman was designated to try the litigation. Following the assignment for trial, respondents undertook to engage in additional protracted discovery. Though Collier sought additional discovery as well, her efforts were rebuffed by Judge Goldman.

As the trial of the case commenced, the City and Pangborne produced documents and evidence which they had previously claimed did not exist. Collier's counsel had reviewed these long-pursued documents immediately prior to the commencement of trial. When these same documents were produced in court, many had been altered; others were destroyed or intentionally misfiled. Collier's counsel called this activity to the attention of Judge Goldman but the judge refused to sanction the defendants.

In the course of trial, Collier did not fare much better. Judge Goldman severely restricted Collier's evidentiary presentation, while allowing Pangborne and the City unfettered latitude. At the close of plaintiff's case, a non-suit was entered in favor of Pangborne. At the close of trial, the jury returned a verdict in favor of the City and against the insolvent drunk-driver.

Strongly believing that the trial court's apparent bias in favor of the defendants was intentional, Collier sought redress in the appellate courts. The Superior Court of Pennsylvania nevertheless affirmed the jury's verdict and the Supreme Court of Pennsylvania declined review.

While the original jury verdict was pending in the appellate courts, Collier commenced litigation against the City, Pangborne and their counsel in Common Pleas Court ("*Collier II*"). The suit alleged that these entities had conspired to obstruct Collier's efforts to recover for her injuries. An out-of-county judge was specially appointed to preside over this lawsuit. Following consideration of initial preliminary objections, the appointed judge stayed all activity in *Collier II* pending final appellate disposition of *Collier I*.

In September of 1988, the Supreme Court of Pennsylvania declined to review *Collier I*. Collier's counsel believed that such declination commenced the running of the statute of limitations for the bringing of a civil rights action against the appellees. In reliance on such belief, confirmed by many others in the legal profession, Collier brought suit in the district court in September of 1990 against the appellees under 42 U.S.C. §§ 1983 and 1984, asserting violations of her civil rights. Several pendent state-law claims were also advanced in the action. Thereafter, respondent Pangborne moved for a more definite statement and respondents Marshall, Dennehey and the City of Philadelphia moved to dismiss the complaint. On November 19,1990, the district court granted Pangborne's motion and denied the motions to dismiss without prejudice to refile them at a later time.

On December 10, 1990, Collier filed an amended complaint. Respondents moved to dismiss this complaint under Fed. R. Civ. P. 12(b)(6). By Order of January 14, 1991, the district court dismissed the complaint and awarded counsel fees to respondents

pursuant to 42 U.S.C. § 1988. The court additionally determined that the filing of the amended complaint was in violation of Fed. R. Civ. P. 11 and imposed costs and counsel fees against Collier's attorney. Prior to assessing the amount of the Rule 11 sanction, Collier sought review of the district court's decision in the Court of Appeals. The assessment of Rule 11 sanctions was stayed pending such review.

On July 12, 1991, the Court of Appeals affirmed the judgment of the district court. Thereafter, affidavits were filed by counsel for the respondents in regards to the matter of attorney's fees. On November 25, 1991, the district court conducted a hearing to determine the amount of counsel fees to be awarded. On December 3, 1991, the district court entered an Order awarding $4,322.69 in counsel fees to respondent Marshall, Dennehey; $2,009.31 in counsel fees to W.V. Pangborne; and $2,025 in counsel fees to the City of Philadelphia. Thereafter appeal was had to the Court of Appeals in the name of plaintiff, as Feingold was not a party to the litigation.

All parties timely filed briefs addressing the propriety of the sanction order entered against Feingold. All parties agreed in their briefs that the Court of Appeals had jurisdiction to consider the appeal. Nevertheless, on October 13, 1992, the Court of Appeals dismissed the appeal, holding that the taking of the appeal in the name of plaintiff, and the failure of Feingold to appeal in his own right, deprived the court of jurisdiction.

Feingold promptly sought leave in the district court to file a notice of appeal *nunc pro tunc* in his own name. By order dated November 23, 1992, the district court denied Feingold's request. A timely appeal of the district court's denial was taken. On June 30, 1993, the Court of Appeals affirmed the district court's denial without opinion. This petition followed.

REASONS FOR GRANTING THE WRIT

I.

THE DISTRICT COURT ERRED IN HOLDING THAT IT LACKED JURISDICTION TO CONSIDER PETITIONER'S MOTION FOR LEAVE TO FILE A *NUNC PRO TUNC* APPEAL BECAUSE PETITIONER'S MOTION WAS NOT FILED WITHIN SIXTY DAYS OF THE JUDGMENT SOUGHT TO BE REVIEWED IN THE APPEAL.

The Third Circuit Court of Appeals dismissed petitioner's appeal of the attorney's fee sanction entered against him under Fed. R. Civ. P. 11 because of a perceived violation of Fed. R. A. P. 3(c). Petitioner's notice of appeal of the sanction order named only plaintiff, Jeanette Collier, as the appellant; the district court had imposed the Rule 11 sanctions only against petitioner Feingold. It was held that the court lacked jurisdiction to review Feingold's objections to the sanctions because he was not denominated as an appellant in the notice of appeal.

Upon receiving the opinion of the Third Circuit Court of Appeals, petitioner Feingold immediately sought to perfect an appeal of the Rule 11 sanction order in his own name. To this end, Feingold filed with the district court on October 29, 1992, a motion to file a nunc pro tunc appeal of the sanction order of December 3, 1991. This motion was opposed only by respondent City of Philadelphia.

On November 23, 1992, the district court denied the motion without opinion. The district court's denial was appealed to the Third Circuit Court of Appeals. On June 30, 1993, the Court of Appeals affirmed the district court's denial order without opinion.[1]

---

1. The Third Circuit's denial was issued by way of a pre-printed from which the court routinely employs as a notice of decision in those instances where the court does not issue a formal opinion. *See* Appendix A.

Because neither the district court nor the Court of Appeals explained the reasoning underlying their decisions, petitioner may only speculate as to the grounds upon which the motion to file an out of time notice of appeal was refused. The absence of any factual findings by the district court, however, suggests that the motion was denied on grounds of timeliness.

Fed. R. A. P. 4(a))(5) provides as follows:

> The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before the expiration of the prescribed time may be *ex parte* unless the court otherwise requires. Notice of any such motion which is filed after the expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

As argued by respondent City of Philadelphia, the district court has absolutely no jurisdiction to allow the filing of an out of time notice of appeal where permission for the late filing is not requested within the original sixty day period following the entry of the order sought to be reviewed on appeal. In contrast, petitioner believes that the wide discretion afforded the district court under Fed. R. Civ. P. 60(b) permits the district court, upon a proper showing, to authorize an out of time notice of appeal where such relief is requested beyond the sixty day time limitation embodied

in Appellate Rule 4(a)(5).[2]

This Court has not had occasion to consider whether Civil Rule 60(b) may be applied to extend the time limitations of Appellate Rule 4(a)(5). There is a divergence of opinion among the Courts of Appeals on this issue. In *Wallace v. McManus*, 776 F.2d 915 (10th Cir. 1985). the Tenth Circuit Court of Appeals held that relief under Civil Rule 60(b) was available to enable a party to perfect an appeal of a district court judgment, despite the absence of a timely motion under Appellate Rule 4(a)(5). In that particular case, the prospective appellant had not received notice of the entry of summary judgment against him until after the expiration of the sixty day period recited in Appellate Rule 4(a)(5). The court held that the Rule's time limitation was not applicable where notice of the entry of judgment was not received until after the sixty days had expired because the lack of notice rendered the timely filing of a Rule 4(a)(5) motion impossible. The court concluded that Civil Rule 60(b) relief was available to relieve a party from the time

---

2. Civil Rule 60(b) provides, in relevant part, as follows:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (I) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered m time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; (6) any other reason justifying relief from the operation of the judgment.

limitations of Appellate Rule 4(a)(5), upon a proper showing of excusable neglect. In so holding, the court relied upon the reasoning of the en banc Ninth Circuit Court of Appeals, which had construed Civil Rule 60(b) in a similar fashion on nearly identical facts in *Rodgers v. Watt,* 722 F.2d 456 (9th Cir. 1983)(en banc).

In contrast to the views of the Ninth and Tenth Circuit Courts of Appeals, other circuits that have considered the issue view the filing of a motion within Appellate Rule 4(a)(5)'s sixty day time limit as a mandatory jurisdictional prerequisite to the perfecting of an out of time appeal, *Kaercher v. Trustees of Health & Hospital of Boston,* 834 F.2d 31 (lst Cir. 1987); *Melton v. Frank,* 891 F.2d 1054 (2nd Cir. 1989); Ali v. *Lyles,* 769 F.2d 204 (4th Cir. 1985); *Cuevas v. Reading & Bates Corporation,* 770 F.2d 1371 (5th Cir. 1985); *Beard v. Carrollton Railroad,* 893 F.2d 117 (6th Cir. 1989). The remaining Courts of Appeals do not appear to have considered the precise question presented here.

The position taken by the Ninth and Tenth Circuits comports most closely with spirit of liberality underlying application of the Federal Rules of Procedure. The drafters of the Rules surely did not intend to disenfranchise from appellate review those who, for proper reason, do not discover the necessity of such review until Appellate Rule 4(a)(5)'s sixty day period has expired; or, more to the point, those who, despite the exercise of proper diligence, fail to uncover a fatal defect in a timely notice of appeal until more than sixty days following the entry of the original determination of which review is sought. True, the time limitations on perfecting appellate review are jurisdictional in nature; yet, the remedial provisions of Civil Rule 60(b) must be deemed to allow access to the appellate judiciary in the narrow circumstances framed here.

Such a construction will do no violence to the efficacy of Appellate Rule 4's time requirements, for it will be the rare case indeed in which the necessity for appeal, or the knowledge of a

fatal defect in a timely filed notice of appeal, can be justifiably claimed to have escaped detection during the sixty day period set forth in Appellate Rule 4(a)(5). Moreover, experience has shown the courts to be stingy with regard to the granting of relief under Rule 4(a)(5). It must follow that access to Rule 4(a)(5) via Civil Rule 60(b) will be permitted only in the most exceptional circumstances.

To the extent, therefore, that the district court here dismissed petitioner's request to file an out of time notice of appeal solely on grounds of timeliness, it did so in error. Petitioner is entitled to a consideration of his request on the merits and remand to the district court is necessary for appropriate factual findings.

The disparate views taken by the Courts of Appeals on this issue thwart the policy goal of uniform application of the rules governing procedure in the federal judiciary. As the question is also one not heretofore addressed by this Court, but certain to arise in future litigation, the petition for certiorari should be granted.

II.

THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING PETITIONER'S MOTION FOR LEAVE TO FILE A *NUNC PRO TUNC* APPEAL.

The district court, to the extent it reached the merits of petitioner's request to file an out of time notice of appeal, abused its discretion in denying petitioner's request. Fed. R. Civ. P. 60(b)(6) grants the district court discretion to afford a party "relief" from a final judgment for any proper reason. The relief sought here was leave to correct the deficiency leading to the Court of Appeals' dismissal of the appeal of the Fed. R. Civ. P. 11 sanctions imposed against petitioner. In effect, as discussed supra, petitioner sought access to the relief afforded under Fed. R. A. P.

4(a)(5), by way of Fed. R. Civ. P. 60(b). As the advisory comment to Appellate Rule 4(a)(5) indicates, where such relief is sought after the expiration of the original appeal period, an applicant must demonstrate that his actions in failing to perfect the appeal initially resulted from "excusable neglect."[3]

Guidelines for determining whether a party's actions amount to excusable neglect were set forth by the Third Circuit Court of Appeals in *Consolidated Freightways Corp. of Delaware v. Larson*, 827 F.2d 916 (3rd Cir. 1987). In discussing this concept, the court stated:

> Although every case must be examined on an ad hoc basis and it is impossible to compose an exhaustive list of factors relevant to a determination of whether excusable neglect has occurred, a thoughtful analysis of this issue in a particular context will, at a minimum, require a weighing and balancing of the following factors: (1) whether the inadvertence reflects professional incompetence such as ignorance of the rules of procedure; (2) whether the asserted inadvertence reflects an easily manufactured excuse incapable of verification by the court; (3) whether the tardiness results from counsel's failure to provide for a readily foreseeable consequence; (4) whether the inadvertence reflects a complete lack of diligence; or (5) whether the court is satisfied that the inadvertence resulted

---

3. For the purposes of this argument, it is assumed that the district court determined that Fed. R. Civ. P. 60(b) permitted it to entertain Feingold's request to file an out of time notice of appeal, despite the expiration of the sixty (60) day period set forth in Fed. R. App. P. 4(a)(5), and that the district court denied the motion on the merits.

> despite counsel's substantial good faith efforts toward compliance.

Id. at 919 (citations omitted). Application of such factors here, yields the conclusion that Feingold's actions leading to the dismissal of the appeal constituted excusable neglect. The district court abused its discretion in refusing to permit an appeal *nunc pro tunc* of the sanction order of December 3, 1991.

First, the filing of the deficient notice of appeal did not result from professional incompetence. *All* parties to the appeal proceeded as though the Court of Appeals had jurisdiction to consider the propriety of the Rule 11 sanctions imposed against Feingold. Indeed, the Court of Appeals itself has acknowledged that the law of standing in the Rule 11 area is unsettled and that there is a split of authority among the courts (Third Circuit Opinion, Appendix C, 5a). Clearly, the fact that counsel for all parties failed to detect the deficiency relied upon by the Court of Appeals in dismissing the appeal belies any claim of professional incompetence.

The inadvertence asserted by Feingold did not reflect an easily manufactured excuse incapable of verification by the court; Feingold's notice of appeal was timely and no advantage was gained from the inadvertent denomination of Collier as the appellant. The consequences of this inadvertence were not readily foreseeable. None of the parties foresaw dismissal of the appeal, nor did they raise the jurisdictional defect in their briefs.

Feingold did act with diligence here, for the original notice of appeal was filed within three weeks of the entry of the sanction Order by the district court. Moreover, briefs were timely filed by all parties upon the merits of the propriety of the sanction Order entered by the district court. Feingold acted diligently in seeking to cure the deficiency in the notice of appeal, as the motion to allow a

nunc pro tunc appeal was filed promptly following his receipt of this Court of Appeals' opinion of October 13, 1992.

In consideration of these circumstances, it is apparent that the grant of the relief sought in the district court was warranted. As the Third Circuit Court of Appeals has observed:

> Though this court does not deny that counsel's error could have been detected by careful proofreading, the court recognizes that even the most diligent practitioners are susceptible to such human error. To declare the acts here involved inexcusable sets no standard to guide future conduct by members of the bar. Precisely because such error can escape undetected even in the most carefully run offices, the district court's application of the excusable neglect standard serves little deterrent purpose. Members of the bar do not have to be reminded to address their mail accurately or caption their cases properly. While the district court's application may effectively deter incompetence, or callous disregard for the rules, the susceptibility to human error is not readily capable of regulatory control.

Larson, supra at 920. Here, the deficiency of the notice of appeal resulted from error undetected by four attorneys and, for a time, by the Court of Appeals itself. Under these circumstances, the improper designation of the "appellant" in the notice of appeal must be held to arise from excusable neglect.[4]

---

4. It was surely apparent to the Court of Appeals that appeal was being had of the sanction order entered against Feingold, as Collier was not an "aggrieved party" under the Order and thus had no standing to appeal it herself.

The provisions of Fed. R. Civ. P. 60(b) permit the district court to afford "relief" from a final judgment for reasons other than "excusable neglect." Indeed, Civil Rule 60(b)(6) allows the district court to grant such relief for any proper reason. Petitioner submits that to the extent that the district court reached the merits of his request to file an out of time notice of appeal, but believed that he had not satisfied the "excusable neglect" standard and therefore denied his motion, the district court also abused its discretion. Of course, each request for relief under Civil Rule 60(b) must be examined in light of its own unique facts; nevertheless, the circumstances of this particular case present a proper reason for affording petitioner relief, regardless of whether they rise to the level of excusable neglect.

To permissibly exercise its discretion in acting upon petitioner's request to file an out of time notice of appeal, the district court, at a minimum, was required to make factual findings regarding the propriety of the claims advanced to justify the requested relief. This it did not do. Petitioner submits that the failure to make factual findings is alone a sufficient basis to find that the district court abused its discretion in denying his motion. Beyond this failure, however, the denial of relief under these circumstances was improper. This Court should grant certiorari to correct the egregious departure of the district court from the appropriate standard governing consideration of petitioner's motion for leave to file an out of time notice of appeal. Moreover, this Court has not had occasion to define the showing required to obtain relief under Appellate Rule 4(a)(5) by way of Civil Rule 60(b); it should avail itself of this opportunity to do so.

CONCLUSION

WHEREFORE, petitioner, Allen L. Feingold, Esquire, respectfully requests this Honorable Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

ALLEN L. FEINGOLD
Attorney Petitioner, Pro Se
809 One East Penn Square
Philadelphia, PA 19107
(215) 564-3500

APPENDIX A — JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD JUDICIAL CIRCUIT AT NO. 92-2075 ENTERED JUNE 30, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-2075

JANETTE COLLIER

V.

MARSHALL, DENNEHEY, WARNER, COLEMAN & GOGGIN; ROBERT G. HANNA, JR., ESQUIRE; W.V. PANGBORNE COMPANY, INC.; CITY OF PHILADELPHIA; SANDRA MAZER MOSS; GILDA KRAMER

Allen L. Feingold,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

D.C. Civil Action No. 90-06001

District Judge: Hon. Donald W. VanArtsdalen

Submitted Under Third Circuit Rule 12(6)

June 25, 1993

Before: BECKER, ALITO, and ROTH, *Circuit Judges*

Appendix A

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed. Costs taxed against appellant.

By the Court,
s/ illegible
Circuit Judge

ATTEST:
s/ P. Douglas Sisk
P. Douglas Sisk, Clerk
DATED: JUN 30 1993

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA ENTERED NOVEMBER 23, 1992

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 90-6001

Van Artsdalen, S.J.

JANETTE COLLIER,

Plaintiff,

v.

MARSHALL, DENEHEY, WARNER, COLEAN and GOGGIN, ET AL.

Defendants.

ORDER

And now this 23rd day of November, 1992, upon consideration of the petition to appeal nunc pro tunc filed by Attorney Feingold in the instant matter, and upon consideration of the City defendants' response thereto, it is hereby ordered and decreed that the petition is denied.

By the court.
s/ Van Artsdalen
Van Artsdalen, J.

Appendix B

XC 11/24/92
Marie Lasota
Craig Thorpe
Ralph Bocchino
Allen Feingold

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD JUDICIAL CIRCUIT AT NO. 91-2081 ENTERED OCTOBER 13, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-2081

JANETTE COLLIER,

Appellant,

v.

MARSHALL, DENNEHEY, WARNER, COLEMAN & GOGGIN; ROBERT G. HANNA, JR., ESQUIRE, W.V. PANGBORNE COMPANY, INC.; CITY OF PHILADELPHIA; SANDRA MAZER MOSS; GILDA KRAMER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil Action No. 90-06001

Submitted Under Third Circuit Rule 12(6)
September 14, 1992

Before: STAPLETON, SCIRICA and NYGAARD, *Circuit Judges*

(Opinion filed Oct 13 1992)

ALLEN L. FEINGOLD, ESQUIRE
Allen L. Feingold Associates
809 One East Penn Square
Philadelphia, PA 19107
Attorney for Appellant

Appendix C

CRAIG L. THORPE, ESQUIRE
Henry P. Stonelake & Associates
1800 John F. Kennedy Boulevard
Philadelphia, PA 19103
Attorney for Appellee
W. V. Pangborne Co., Inc.

MARIE C. LASOTA, ESQUIRE
Office of City Solicitor
1101 Market Street
9th Floor
Philadelphia, PA 19107-2996
Attorney for Appellees
City of Philadelphia,
Sandra Mazer Moss,
Gilda Kramer

OPINION OF THE COURT

NYGAARD, *Circuit Judge.*

Allen L. Feingold, Esq., who represented plaintiff Janette Collier at trial, appeals a Rule 11 order imposing attorney's fees and costs as a sanction against him. We will not consider the merits of Feingold's appeal, but rather will dismiss it because we lack jurisdiction.

I.

In January 1991, the district court granted a defense motion and dismissed plaintiff's complaint. Pursuant to 42 U.S.C. § 1988, it awarded costs and reasonable attorney's fees to defendants. Additionally, it ordered that

Appendix C

> [u]pon the filing of affidavits as to costs and reasonable attorney's fees incurred by defendants, and any response to such affidavits, including any explanation of any mitigating factors, plaintiff's counsel, Allen L. Feingold, shall pay costs and fees as a sanction for violating Fed. R. Civ. P. 11.

Plaintiff appealed the motion to dismiss, but since the amount of costs and fees imposed under Rule 11 had not been determined, the portion of the order awarding them was not appealable. *Napier v. Thirty or More Unidentified Federal Agents*, 855 F.2d 1080, 1089-90 (3d Cir. 1988). Hence, proceedings on the Rule 11 sanctions were stayed pending the appeal. After we affirmed the dismissal, the district court conducted a hearing and issued its order quantifying the amount of the attorney's fees imposed as sanction against Feingold. Janette Collier appeals.

II.

Federal Rule of Appellate Procedure 3(c) provides that the notice of appeal "shall specify the party or parties taking the appeal." The notice of appeal filed by Feingold reads:

> NOTICE is hereby given that Plaintiff, *Janette Collier,* hereby appeals to the United States Court of Appeals for the Third Circuit, from the Memorandum and Order of the Honorable Donald W. VanArtsdalen, entered in this action on the 3rd day of December, 1991.

(emphasis added.)

Appendix C

Feingold filed the notices of appeal, not on his own behalf but on behalf of Collier. The issue is whether we have appellate jurisdiction to review a judgment imposing Fed. R. Civ. P. 11 sanctions on an attorney when the notice of appeal is in the name of the client only. If a party fails to satisfy the requirements of Rule 3(c), we lack jurisdiction over that party. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317 (1988).

Even though the notice of appeal technically varies from the letter of Rule 3(c), it is sufficient if it is the "functional equivalent" of a notice. 487 U.S. at 317. The functional equivalent to a notice of appeal must, however, identify Feingold as the party taking the appeal. *CTC Imports & Exports v. Nigeria Petroleum Corp.*, 951 F.2d 573, 576 (3d Cir. 1991). Nothing in the record here supports the finding of a functional equivalence nor gives any notice that Feingold is the appellant. The only notice of appeal he filed was on behalf of Collier, which we conclude is not a sufficient notice of appeal on his behalf.

The reasons for this are obvious. Because the standards governing Rule 11 sanctions differ substantially between orders against parties and orders against attorneys, the interests of a client and the interests of an attorney may well conflict in Rule 11 proceedings.

First, unless Collier, represented as she was by an attorney, knowingly commits an act that violates Rule 11, sanctions against her would not be appropriate. Second, a different situation is presented with respect to Feingold, who, because of the professional standards to which he is held, is considered to know the impropriety of his conduct, and from his professional responsibility should act to prevent it. Hence, where the attorney acts improperly or fails to advise an unwary client of the

impropriety of the client's conduct, the burden of sanctions should fall entirely upon the attorney. *See Quiros v. Colon,* 800 F.2d 1, 2-3 (1st Cir. 1986). A third situation would be presented where the party herself knows that the filing, and/or the signing is improper, and the attorney reasonably should also know. In this situation, Rule 11 sanctions against both of them are appropriate. *Landon v. Hunt,* 938 F.2d 450, 453 (3d Cir. 1991). Finally, if Collier had misled Feingold, but Feingold nevertheless had an objectively reasonable basis for his actions, then sanctions against Collier alone would have been appropriate. *Calloway v. Marvel Entertainment Group,* 854 F.2d 1452, 1475 (2d Cir. 1988). Because the interests of a client and her attorney differ, and may indeed conflict, each must appeal if the district court imposes sanctions against them. *Landon,* 938 at 451. Consequently, this notice of appeal would be sufficient only in an appeal from Rule 11 sanctions imposed against Collier. Here, since Allen L. Feingold is the real party in interest, Rule 3(c) requires that he appeal in his own name.

We hold that when sanctions are imposed only upon the attorney and the notice of appeal is in the name of the client alone, we are jurisdictionally barred from considering an appeal of the order imposing sanctions against the attorney.

In so holding, we are in accord with most courts of appeals that have considered the issue. *See DeLuca v. Long Island Lighting,* 862 F.2d 427, 429 (2d Cir. 1988); *Mylett v. Jeane,* 879 F.2d 1272, 1275 (5th Cir. 1989); *Rogers v. National Union Fire Ins. Co.,* 864 F.2d 557, 560 (7th Cir. 1988); *Reynolds v. East Dyer Dev. Co.,* 882 F.2d 1249, 1254 (7th Cir. 1989). *See also* 5A Wright & Miller, Federal Practice and Procedure, § 1337 at 133-34 (2d ed. 1990) ("The person sanctioned is the real party in interest on the appeal and should be named in the notice of appeal.") *But see Corp. of the*

Appendix C

Presiding Bishop v. Assoc. Contractors, 877 F.2d 938 (11th Cir. 1989) (post-*Torres* case in which the *Torres* decision is not discussed, and where the court concluded that if sanctions are imposed "jointly and severally" against an attorney and client, a notice of appeal in the name of the client alone is sufficient).

In sum, we conclude that because Feingold failed to file the notice of appeal in his own name, and the record contains no functional equivalent of a proper notice of appeal, we lack jurisdiction to review the order imposing Rule 11 sanctions against him. We will dismiss.

TO THE CLERK:

Please file the foregoing opinion.

s/ illegible
Circuit Judge

APPENDIX D — ORDER AND OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA ENTERED DECEMBER 3, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 90-6001

JANETTE COLLIER

V.

MARSHALL, DENNEHEY, WARNER, COLEMAN & COGGIN and ROBERT G. HANNA, JR. ESQ. and W.V. PANGBORNE COMPANY, INC. and CITY OF PHILADELPHIA and SANDRA MAZER MOSS and GILDA KRAMER

ORDER

For the reasons discussed in the attached memorandum, after consideration of all papers and affidavits, and after a hearing, plaintiff's attorney, Allen L. Feingold is hereby ORDERED to pay the following amounts as reasonable attorney's fees and costs, as a sanction for violating Federal Rule of Procedure 11:

1. To Marshall, Dennehey, Warner, Coleman & Coggin, and Robert G. Hanna, Jr. the sum of Four Thousand, Three Hundred, Twenty-Two dollars and Sixty-Nine cents ($4,322.69);

2. To W.V. Pangborne Company, Inc., the sum of Two Thousand, Nine dollars and Thirty-One cents ($2,009.31); and

3. To the City of Philadelphia, the sum of Two Thousand and Twenty-Five dollars even ($2,025.00).

Plaintiff's motion to preclude the attorney's fees of the City of Philadelphia and Sandra Mazer Moss is DENIED.

BY THE COURT:
s/Donald W. VanArtsdalen
Donald W. VanArtsdalen, S.J.

December 3, 1991.

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 90-6001

JANETE COLLIER

V.

MARSHALL, DENNEHEY, WARNER, COLEMAN & COGGIN and ROBERT G. HANNA, JR. ESQ. and W.V. PANGBORNE COMPANY, INC. and CITY OF PHILADELPHIA and SANDRA MAZER MOSS and GILDA KRAMER

MEMORANDUM AND ORDER

VanARTSDALEN, S.J. December 3, 1991

Plaintiff was allegedly injured in an accident on July 3, 1974 when an uninsured motorist collided with a street light. She claims that the light fell and struck her face. She filed suit in the Court of Common Pleas against the motorist, the City of Philadelphia (City), and W.V. Pangborne Company, Inc. (Pangborne), which allegedly designed the light standard *(Collier I)*. At trial, the court directed a non-suit in favor of Pangborne and the jury found in favor of the City. Plaintiff obtained a verdict against the motorist, which she claims is uncollectible. The verdict was apparently unsuccessfully appealed to the Pennsylvania Superior and Supreme Courts.

In 1984, plaintiff brought a second action in state court against Pangborne; Marshall, Dennehey, Warner, Coleman & Coggin

(Marshall, Dennehey), Pangborne's counsel in the original suit; the City; and Sandra Mazer Moss and Gilda Kramer, counsel for the City *(Collier II).* Plaintiff alleged, *inter alia,* that the compulsory non-suit and the jury finding in favor of the City in *Collier I* resulted from improper actions on the part of defendants and their attorneys during the course of that litigation. This suit is still pending in the state courts.

In 1990, plaintiff filed the instant suit in this court. The original complaint in this action was almost identical to the complaint in *Collier II,* except that it added claims under 42 U.S.C. §§ 1983 and 1984, and several new state law theories of recovery. On November 19, 1990, I granted Pangbornes motion for a more definite statement, and denied Marshall, Dennehey's and the City's motions to dismiss, without prejudice to refile the motions at the appropriate time. On December 10, 1990, an amended complaint was filed, which all defendants moved to dismiss.

By order of January 14, 1991, I granted defendants' motions to dismiss. Pursuant to 42 U.S.C. § 1988, costs and reasonable attorney's fees were awarded to defendants. Additionally, I ordered that "[u]pon the filing of affidavits as to costs and reasonable fees incurred by defendants, and any response to such affidavits, including an explanation of any mitigating factors, plaintiff's counsel, Allen L. Feingold, shall pay such costs and fees as a sanction for violating Fed. R. Civ. P. 11."

An appeal was taken,[1] and proceedings in this court were stayed pending the appeal for reasons of judicial economy. The

---

1. Since the amount of fees had not yet been fixed, the portion of the order awarding them was not appealable. *Napier v. Thirty or More Unidentified Federal Agents,* 855 F.2d 1080, 1089-90 (3d Cir. 1988).

decision was affirmed by the Third Circuit Court of Appeals. Affidavits regarding fees have now been filed by all defense attorneys. Plaintiff's counsel has responded. A hearing was held for the purpose of putting any additional evidence on the record that the attorneys wished to produce. The matter of attorney's fees is now ripe for decision.

I. *The Standard*

The Third Circuit has set out standards to be used by district courts in this circuit for the determination of what constitutes a reasonable fee. *Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973) *(Lindy I), appeal after remand,* 540 F.2d 102 (3d Cir. 1976) *(Lindy II).* Though these cases involved attorney's fees charged to unrepresented class claimants, the standards governing reasonable fees are applicable here. *See Napier v. Thirty or More Unidentified Federal Agents,* 855 F.2d 1080, 1093 (3d Cir. 1988) (applying *Lindy II* to a Rule 11 case).

A process was outlined in *Lindy I,* and explained in *Lindy II,* by which a district court calculates a reasonable fee. First, the court should determine the hours spent by the attorney. Included in this determination involves breaking down the hours by activity, and by particular attorney (*e.g.*, partner, associate). *Lindy I* at 167. Second, the court should find an appropriate value for the attorney's time. This is generally reflected in the attorney's normal billing rate. The court should fix a reasonable hourly rate, based on such considerations as the attorney's reputation and status in the practice of law. *Lindy I* at 167. Third, the hours reasonably spent are to be multiplied by the reasonable hourly rate. The product of this multiplication is called the "lodestar" amount.

The lodestar can then be reduced or increased based on certain factors. The first of these is the contingency of recovery. This factor is irrelevant in this case.[2] The second factor is the quality of the attorney's work. If the skill of the attorney is unusually good or unusually poor, the lodestar amount can be increased or decreased proportionately. *Lindy II* at 118. There is a heavy burden of proof for such a shift in the lodestar, as the quality of an attorney's work is usually reflected in the reasonable hourly rate, thus already accounted for in the lodestar amount. *Lindy II* at 117-18. There was no attempt to meet this burden in this case.[3]

In a Rule 11 situation, equitable considerations apply. Thus, if there are any factors which may mitigate the sanctions, the lodestar amount should be reduced accordingly. "A particularly relevant equitable factor is the sanctioned party's ability to pay." *Doering v. Union County Board of Chosen Freeholders,* 857 F.2d 191, 195 (3d Cir. 1988).

Given this framework, consideration of the fees attributable to each defendant's counsel is now appropriate.

---

2. When an attorney is to be given reasonable compensation for the work he has done, the contingency of the result is a relevant consideration. However, here the attorney is merely compensated for the reasonable expenses incurred in responding to a frivolous filing. The probability of his success on the merits is not relevant. What is relevant is the reasonable time spent.

3. Even if there was, it is likely that this factor is also irrelevant in a Rule 11 situation. The reasonable attorney's fees charged to plaintiff's attorney are a sanction. He is not here paying the reasonable value of services from which he benefited, he is instead paying the value of services which would not have been performed had he not made a frivolous filing. If his opponent has responded to his frivolous filing with a short submission of remarkable quality, he would not be required to pay any more than the reasonable cost of preparing the short submission.

Appendix D

II. *The Fees of Marshall, Dennehey*

A. *Reasonable Hours*

Marshall, Dennehey and Robert G. Hanna, Jr. were represented by Ralph Bocchino of Marshall, Dennehey. Marshall, Dennehey submitted affidavits and detailed time sheets which establish the total hours worked at 27.6 for attorney Bocchino, and the total hours worked at 53.7 for attorney Hausman,[4] on the defense of this action at the district court level.

1. *Duplicitous?*

Attorney Feingold objects to this breakdown of time only in the most general manner. He argues first that the hours expended are not reasonable because most of the work that went into responding to his complaint was already done, in *Collier II*. I find that this argument is not convincing. I granted the motion to dismiss on statute of limitation grounds. I found that the statute of limitations for § 1983 claims had clearly run in this case. Obviously, this is a federal issue and the research for, and argument on, the issue could not have been done in connection with a lawsuit in state court. Additionally, other federal issues were briefed in this court, and I rested my decision on them as well (*e.g.*, insufficient proof of state action, no respondeat superior liability for

---

4. The print-out also includes 1.9 hours billed to other unknown attorneys (under the attorney numbers 76 and 59). As no affidavits have been submitted as to their identities or reasonable hourly rates (though it appears from the print-out that their time is billed out at $80 per hour), these hours will be excluded from the calculations.

government entities under § 1983).[5] Thus, the hours expended by Marshall, Dennehey are reasonable, as several new issues were researched and argued before this court.

2. *Training?*

Second, and in connection with the first claim, Feingold argues that the hours spent were not *really* spent on the lawsuit, but were instead spent training new attorneys. Feingold argues that young associates were allowed to do the work on this lawsuit, and that if a more experienced attorney had been working on it properly, much fewer hours would have been expended. "[T]he counsel on the case was teaching his associate how to do the work and they are requesting that plaintiff's counsel pay for this learning process." (Plaintiff's Affidavit in Opposition to the Affidavits for attorney's fees for the Defendant Marshall, Dennehey, Warner, Coleman & Coggin and Robert G. Hanna, Jr., Esq., third unnumbered page.) Surely Feingold cannot mean to imply that young associates should never work on a case when a more experienced and, presumably, more efficient attorney is available. Moreover, the difference in efficiency is accounted for in the reasonable hourly fees (discussed below). A younger attorney

---

5. While Feingold is insistent that almost all of the *issues* briefed by Marshall, Dennehey have already been briefed in state court, the majority of the *argument* made was based on federal issues. The 12(b)(6) motion filed on November 7, 1990 by Marshall, Dennehey is instructive. Of a 21-page argument, 12 pages are devoted exclusively to federal claims and the Federal Rules of Civil Procedure, and 2 are devoted to lis pendens (based on the Common Pleas suit). Thus, at least 2/3 of the argument could not have been briefed in the Common Pleas suit.

Though Feingold claims (in an unsworn document improperly called an affidavit) that the issues were presented in state court, he never attached copies of the pleadings filed there, thus I cannot further judge the extent of the duplication.

reasonably charges less per hour than a more experienced attorney. Thus young attorneys gain experience, but without overburdening the client with exorbitant fees.

Feingold did not point to any particular items on Marshall, Dennehey's print-out of hours expended with which he takes issue.[6] To the extent that he did not specifically oppose any time spent, I need not *sua sponte* conduct an in-depth investigation into Marshall, Dennehey's time sheets. *Cunningham v. City of McKeesport,* 753 F.2d 262, 267 (3d Cir. 1985), *vacated on other grounds,* 478 U.S. 1015 (1986) ("In statutory fee cased, however, when an opposing party has been afforded the opportunity to raise a material fact issue as to the accuracy of representations as to hours spent, or the necessity for their expenditure, and declines to do so, no reason occurs to us for permitting the trial court to disregard uncontested affidavits filed by a fee applicant"). Therefore, the figure of 27.6 hours for Bocchino and 53.7 hours for Hausman will be accepted as reasonable.

---

6. In Feingold's so-called affidavit, he states:

> Without the opportunity to take the depositions of defense counsel, a bare review of this record, shows the absolute absurdity of defense counsel's actions, alleging this type of work and this amount of work, for reusing and rehashing the same information in two Common Pleas sets of preliminary objections to two Federal Court Motions to Dismiss and one appellate response.

On September 9, 1991, I granted plaintiff's counsel an opportunity to depose defense counsel regarding his rate, experience, hours expended and work performed. Feingold does not claim that Bocchino did not attend his noticed deposition. However, no further objections, specifically those specifying time not reasonably spent, were ever filed or raised at the hearing.

Appendix D

3. *Hours Spent of Appeal*

Marshall, Dennehey filed a supplemental affidavit claiming almost $6,000 in fees for defending the appeal to the Third Circuit. These fees cannot be awarded under Rule 11. While in a but-for sense, the fees on appeal were a direct result of the original filing of the frivolous complaint, they cannot be awarded here. Rule 11 governs only district court proceedings, not appellate proceedings. It was for the Court of Appeals to determine, pursuant to Federal Rule Appellate Procedure 38, if the appeal itself was frivolous and would subject appellant to sanction. *Cooter & Gell v. Hartmarx Corp.*, ___ U.S. ___, 110 S. Ct. 2447, 2461-62 (1990) ("We believe Rule 11 is more sensibly understood as permitting an award only of those expenses directly caused by the filing, logically, those at the trial level"). Therefore, these fees will be excluded from the lodestar amount.

B. *Reasonable Hourly Fee*

Feingold did not take issue with the hourly rates claimed by Bocchino and Hausman. In the face of uncontroverted affidavits as to the fee charged, I have no discretion to refuse to accept the rates. *Black Grievance Comm. v. Philadelphia Elec. Co.*, 802 F.2d 648, 653 (3d Cir. 1986), *vacated on other grounds*, 483 U.S. 1015 (1987). Therefore, the hourly fees of $135 for Bocchino and $80 for Hausman will be used in calculating the lodestar amount.

As a result, the lodestar amount for Marshall, Dennehey is calculated as follows:

Bocchino:

27.6 hours x $135 per hour = $3,726.00

Appendix D

Hausman:

53.7 hours x $80 per hour = $4,296.00

for a total lodestar of $8,022.00. Marshall, Dennehey also claimed an unopposed amount of $623.38 for costs.

III. *The Fees of W.V. Pangborne*

A. *Reasonable Hours*

W.V. Pangborne Company, Inc. was represented by Stonelake & Associates (Stonelake), who is their insurer's house counsel. As such, their attorneys are salaried and not paid on an hourly basis. Nonetheless, Stonelake's attorney's keep contemporaneous records of the hours spent on each case, though these records are not itemized by task.

Based on these records, Stonelake claimed that attorney Thorpe worked 17.6 hours on this litigation, and law clerks worked 51.0 hours on it. Though more detailed records clearly would have been preferred, given the circumstances,[7] I have determined that this total amount of hours is reasonable. In light of the motions which have been filed in this litigation, the hours claimed by counsel in their preparation is reasonable.

---

7. It cannot be the case that house counsel can never recover a reasonable attorney's fee because specific records are not kept. Indeed, there is some authority for recovery of attorney's fees when no contemporaneous records have been kept, if the hours spent can be reconstructed. *Lindy II* at 109.

Appendix D

B. *Objection*

Feingold claims that these hours are unreasonable because contemporaneous time sheets detailing time spent in tenths of the hour were not kept.[8] It is clear from *Lindy II,* however, that such records need not be kept in order to recover attorney's fees. Rule 11 provides for recovery of a reasonable fee, it does not provide for recovery of a reasonable fee based only on certain documentation.

Feingold also objects that the hours must have been duplicitous.[9] The discussion of this objection above is also applicable here. Additionally, attorney Thorpe was not counsel in the Common Pleas action and he required extra time to "get up to speed" in this case. He did not bill any of this time. The hours claimed were reasonable in light of the pleadings, and are probably an understatement of the time actually spent.

C. *Other Hours*

Stonelake also claims recovery for 27.5 hours for Thorpe, and 12 hours for law clerks, that were spent on the appeal. These hours

---

8. At the hearing, Feingold read from the local rules of the Bankruptcy Court of the Southern District of New York. These rules are obviously not controlling for litigants in the District Court for the Eastern District of Pennsylvania.

9. Not only does Feingold claim that the work was duplicitous of that filed in *Collier II,* he argues that it was duplicitous of the work done by other defendants in this case. Factually, this is incorrect. Pangborne, for example, was the only defendant to move for a more definite statement. While some of the work may have been similarly performed by other counsel, I find the hours claimed by Stonelake to be reasonable in light of their duty to mitigate. Had Pangborne been the only defendant in this suit, a higher amount of hours would have been reasonable.

are not recoverable. Additionally, a supplemental affidavit was filed for an extra 2 hours for Thorpe and 1.5 hours for attorney Stonelake for the defending of Thorpe's deposition. The deposition was taken by Feingold, in order to better determine the amount of fees to which Stonelake was entitled.

Though it is disputable whether Thorpe could recover for the time his actual deposition was taken,[10] I need not decide the issue. At the hearing, Thorpe was asked the total number of hours he was claiming, and he only claimed the time spent litigating the issue at trial and on appeal. Thus, his claim for these extra hours is deemed waived.

D. *Reasonable Hourly Fee*

Thorpe requests an hourly fee of $83.33 per hour for himself, and $50 per hour for the law clerks. He referred to this amount as a "bargain basement rate" and I agree. Thorpe has been a member of the Bar since 1983 and he is an experienced litigator.

In attempting to determine the reasonable market rate for Thorpe's services, Feingold directs my attention to the fact that Thorpe's salary is much less than $83.33 per hour.[11] This is

---

10. At this time he was merely acting as a witness, not an attorney.

11. I note that, at any major law firm, an associate's salary must be less than the rate at which her services are billed out. For example, a young Manhattan attorney, at a "Top Ten" law firm, billing 2300 hours per year at $150 per hour makes much less than $345,000 her fees total. The difference between the income that she generates for the firm and the salary that she is paid pays for the costs of generating that income (office rent, secretarial services, etc.) and the remainder is profit. If salary was equivalent to the reasonable hourly rate, every law firm would be unable to pay its rent.

irrelevant. *Rodriguez v. Taylor,* 569 F.2d 1231, 1248 (3d Cir. 1977), *cert denied,* 436 U.S. 913 (1978) discussed the calculation of fees for a salaried legal aid attorney. The court held that *relative* salaries may be relevant, as they signal a difference in *relative* reasonable hourly rates, based on differences in expertise and responsibility. However, absolute salaries should not be emphasized. What is relevant is what an attorney with Thorpe's experience would command as an hourly rate in the marketplace. Eighty-eight dollars and thirty-three cents is indeed a "bargain basement rate" for an attorney with 8 years experience in litigation.

As a result, the lodestar amount for Stonelake is calculated as follows:

Thorpe:

17.6 hours x $83.33 per hour = $1,466.61

Clerks:

51.0 hours x $50 per hour = $2,550.00

for a total lodestar amount of $4,016.61. Stonelake also claimed $2 in costs for filing fees.[12]

IV. *The Fees of the City*

The City of Philadelphia and Sandra Mazer Moss were

---

12. Stonelake claims $1,456.61 [sic] for Thorpe, $2,550 for clerks and $2 for fees in its first affidavit, filed March 1, 1991. However, Stonelake claims the total fees, expenses & costs equals $4,708.61. With no evidence supporting the extra $700, it will not be awarded.

represented by attorney Day of the City.

A. *Reasonable Hours*

Attorney Day is a salaried public employee. As a result, he does not keep detailed time sheets. He has, however, provided an estimate that he spent 30 hours working on all 12(b)(6) motions in this case. In light of the work performed on this case, it is likely that substantially more time was spent. Thus, an estimate of 30 hours is reasonable. Day does not claim any fees for the time he spent working on the appeal.

B. *Reasonable Hourly Fee*

Similar to Thorpe, Day is paid a salary. As Day is a public employee, his salary has little relevance to the amount of money that his services would command on the open market. Day has been a member of the Bar since 1967. He is in charge of major trials in the City Solicitor's Office. Obviously, he is an experienced attorney who would command fees similar to those of a partner with a major law firm.

Day claims a fee of $200 per hour. While Day may be correct in his belief that his services would command this hourly rate, it appears out of proportion to fees charged by attorneys with his level of expertise. Thus, his fee should be reduced to $135 per hour.

The lodestar amount for Day is calculated as follows:

30 hours x $135 per hour = $4,050.00

The city did not submit an affidavit as to costs.

Appendix D

C. *Objections*

Feingold objected to the hours claimed and the hourly rate. He believed that the hours claimed are duplicitous, as well as unsupported. He argued that the hourly rate was disproportionate to Day's salary.

The hours charged must be substantiated. A claim of spending "in excess of 6,000 hours in connection with this litigation" was found to be insufficient. *Lindy I* at 167. Day's estimate, however, is much more specific. He claims that he spent 30 hours in preparation of the 12(b)(6) motions in this case. His claim is a reasonable estimate, not a guess to the nearest thousand. Furthermore, he identified the specific task he performed during those hours. Finally, Day's estimate is a reasonable one, in line with my own estimate based on the pleadings he has filed in this case.

Feingold's objections based on Day's salary are as meritless as those based on Thorpe's salary, and the discussion regarding the latter is equally applicable here.

Finally, Feingold claims that the City should be precluded from receiving fees because Day did not attend his scheduled deposition to be questioned regarding his fees. However, Feingold never filed a motion for sanctions or to compel his attendance. Given that, precluding fees will not be a sanction for missing a deposition. Additionally, Feingold was offered the opportunity to put Day on the stand and question him at the hearing. He declined.

V. *Mitigating Factors*

As discussed above, a Rule 11 sanction must be mitigated by

an attorney's inability to pay. *Doering* held that the deterrent effect of Rule 11 sanctions depends on the sanctioned party's resources. Feingold testified at the hearing that his net worth is negative $250,000.00. His taxable income last year was less than $50,000.00, less than $3,500 of which was generated by his practice of law. Feingold was in partial retirement from legal practice, and he has recently returned full time. Last year, he was not practicing at all until April, as a result of physical injuries.

If I were to eliminate the majority of attorney Feingold's sanction because of his financial condition, I would be, in effect, giving insolvent attorneys license to freely violate Rule 11. While I sympathize with Mr. Feingold, I cannot allow his poverty to be a complete defense to sanctions.

There is some concern that a substantial award against Mr. Feingold might force him into bankruptcy. At the hearing, however, Feingold testified that this was not the case. He said that he will not be bankrupt. If he is ordered to pay, he said that he will pay.

Additionally, now that Mr. Feingold has returned to the full-time practice of law, he has the ability to generate substantial amounts of income. Six or seven years ago, his net worth was over $600,000. While he may be at a low point financially, it appears that he is currently back on the road to financial stability, and that an award against him will be collectible at some future date.

In light of these factors, Mr. Feingold's current financial condition, and his future prospects, I believe that a reduction of 50% is appropriate. Thus, Marshall, Dennehey and Robert G. Hanna, Jr. are entitled to attorney's fees and costs in the amount of $4,322,69. Pangborne is entitled to attorney's fees and costs in the

amount of $2,009.31 and the City and Sandra Mazer Moss are entitled to attorney's fees in the amount of $2,025.00.

An order follows.